

Publication in the Official Journal Yes / No

File Number: T 869/90 - 3.4.1
Application No.: 84 301 562.9
Publication No.: 0 121 359
Title of invention: Electromagnetic borehole logging apparatus and method

Classification: G01V 3/30

I N T E R L O C U T O R Y - D E C I S I O N
of 15 March 1991

Applicant: Texaco Development Corporation

Headword: Restitutio/TEXACO

EPC Art. 108, 122; Rules 78(3), 83(4)

Keyword: "Mis-calculation of time limit for grounds of appeal" - "one day
late" - "all due care (yes)" - "proportionality" - "re-
establishment (yes)"

Headnote



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Boards of Appeal

Chambres de recours

Case Number : T 869/90 - 3.4.1

I N T E R L O C U T O R Y - D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 15 March 1991

Appellant : Texaco Development Corporation
2000 Westchester Avenue
White Plains, New York 10650 (US)

Representative : Wood, Anthony Charles
Urquhart-Dykes & Lord
91 Wimpole Street
London W1M 8AH (GB)

Decision under appeal : Decision of Examining Division 038 of the
European Patent Office dated 30 May 1990 refusing
European patent application No. 84 301 562.9
pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : G.D. Paterson
Members : R. Shukla
U. Himmler

Summary of Facts and Submissions

- I. European application No. 84 301 562.9 was refused by the Examining Division in its decision dated 30 May 1990. A notice of appeal was filed on 31 July 1990. A statement of grounds of appeal was filed on 10 October 1990. By letter dated 30 November 1990 the Registrar of the Board of Appeal informed the Appellant that it appeared that the statement of grounds of appeal was not within the time limit of Article 108 EPC, which expired on 9 October 1990.

In a reply dated 5 December 1990, the Appellant's representative challenged what the Registrar had indicated, stating that "Since the month of September has thirty days, I believe ten days after 30 September (the notional four-month term) runs to 10 October 1990".

In a further letter dated 19 December 1990, the Registrar explained in detail, with reference to the wording of Article 108 EPC and Rules 78(3) and 83(4) EPC, that the time limit for filing the statement of grounds of appeal expired on 9 October 1990.

- II. An application for re-establishment of rights under Article 122 EPC was filed on 9 January 1991.

The grounds for re-establishment were essentially as follows:

The representative had been fully familiar with the "ten day" provision of Rule 78(3) EPC, which has notoriously given rise to difficulties. His invariable practice was to disregard the ten days provided under this Rule when initially calculating time limits and to set out a time limit without reference to this Rule in letters seeking

instructions from clients and associates. As regards this time limit, first and second cross-checks were provided by his secretary and the client or associate, respectively. Only if the expiry date was imminent did he consider using the ten-day provision, and in practice he avoided going close to the final deadline as far as possible. Such previous practice had proved reliable over many years.

His letter to the Registrar dated 5 December 1990 had been sent in a state of shock and reluctance to accept the fact that the time limit had not been observed, and gave a false impression that the representative was not properly familiar with Rule 78 EPC.

In the present case, instructions were received about two weeks before 30 September 1990. The file was marked with a sticker denoting urgency at that time, but the case was a difficult one, and pressure of work prevented the preparation of the statement of grounds until the weekend of 6 and 7 October. At this point, when the statement of grounds had been completed, the representative marked the sticker with the final date of 10 October 1990, thus miscalculating the time limit.

The statement of grounds was typed and ready on 9 October, but was not sent to the EPO by fax until 10 October, together with a covering letter, in (false) reliance upon the date of 10 October marked on the sticker on the file.

It was submitted that the facts show an isolated procedural mistake within a normally satisfactory system, and that in accordance with Decisions J (2 and 3)/86 the case was appropriate for re-establishment.

Reasons for the Decision

1. The application for re-establishment complies with the formal requirements of Article 122 EPC. The cause of non-compliance with the time limit was removed at the earliest on receipt of the Registrar's first letter on 3 December 1990, and the application was filed within two months of that date. The omitted act, failure to file the statement of grounds of appeal, was completed one day late.

2. The requirement that "all due care required by the circumstances" was taken to comply with a time limit requires individual consideration of the circumstances of each individual case. In a case such as the present, a first consideration is whether the system for observing such a time limit was normally satisfactory. In the sense that, before this case, it appears to have worked without previous problems, it can be said to have been normally satisfactory. This may in part be because the representative is as conscientious and reliable as may be expected from a professional representative, and because he rarely needed to use the final ten-day period. Nevertheless, perhaps with the benefit of hindsight derived from the experience of this case, it is certainly possible to question whether the system used by the representative was as watertight as may reasonably be expected. In particular, the absence of any kind of cross-check upon the actions of the representative in question during the final ten days before the deadline is notable. The representative himself appears to have been in effect entirely responsible, during this final ten-day period, for meeting the time limit for the statement of grounds as well as for drafting it. Nobody is immune from a human error such as occurred in the present case, especially when under pressure to complete the necessary substantive work. Especially in the context of a time limit which is

inextensible (such as the present time limit), the provision within an office system of a cross-check upon the activities of the representative responsible for the substantive work, by an independent person whose duty it is to ensure that the document in question is dispatched on time, seems a reasonable precaution (at least with hindsight). The absence of such a cross-check in circumstances similar to the present case might well lead to a finding of lack of due care in future cases. The Board has however recognised that until the present case occurred, the possibility that such an error could be made by the representative or one of his partners probably seemed extremely remote. Thus the Board is prepared to accept, with some degree of doubt, that the requirement of "all due care" has been satisfied.

Furthermore, the Board has taken account of the fact that at least during the "normal" four-month period up to 30 September, there appears to have been a reliable system to ensure compliance with the time limit. As indicated above, the Board has had some doubts as to whether "all due care" was exercised on behalf of the Appellant during the final ten-day period. In this connection, however, it can be said that the worst that could normally (i.e. except in February) result from any lack of due care in the calculation of the final ten-day time limit was the missing of the time limit by one day, as actually happened.

In accordance with general principles of law, as applied in the context of administrative law, a procedural means used to achieve a given end (e.g. a sanction following a procedural non-compliance) should be no more than that which is appropriate and necessary to achieve that end; this is commonly referred to as the principle of proportionality. While the Board is not specifically

applying this principle to the present case, nevertheless it would seem to be reasonable, in a case such as the present where there may be some doubt as to whether or not "all due care required by the circumstances" was exercised, to have this principle in mind. Any person who has been misled in the sense of Article 122(6) EPC by the fact that the statement of grounds of appeal was filed one day late would be protected by Article 122(6) EPC. In contrast, the loss of the patent application because of such a procedural irregularity would be a severe result. In assessing the question of "all due care" in the present case, the Board has in mind the fact that if there was any lack of due care, "the circumstances" include the fact that the result of any such lack of due care was that the time limit was only missed by one day.

The Board is accordingly satisfied that in spite of all due care required by the circumstances having been taken by the Appellant, he was unable to observe the time limit for filing the statement of grounds of appeal in this case. The application for re-establishment of rights is therefore allowed.

Order

For these reasons, it is decided that:

The rights of the Appellant are re-established in connection with the filing of an admissible appeal, and the statement of grounds of appeal shall therefore be considered as having been filed within the four-month time limit provided by Article 108 EPC.

The Registrar:

The Chairman:

P. Martorana

G.D. Paterson